United States Court of Appeals

for the Second Circuit

APPENDIX

77-7175

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P/S

United States Court of Appeals

For the Second Circuit

G. THOMAS CESTARO, CATHERINE CESTARO, RICHARD MARCHETTI and STA-BRITE AUTO PAINTING CORP.,

Plaintiffs-Appellants,

against

THOMAS J. MACKELL, JAMES D. ROBERTSON, FREDERICK J. LUDWIG, JOSEPH N. MONTY, DAVID J. MCKEON, SALVATORE GIUFFREDA, JOHN SAVAGE, BERNARD NELSON, CHARLES NAPOLITANO, STUART B. STILLMAN, AVIS RENT-A-CAR SYSTEM, INC., and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of New York

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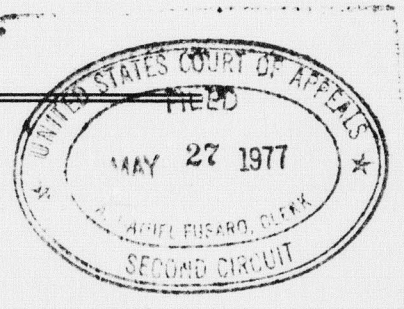
APPENDIX



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RELEVANT DOCKET ENTRIES

4/12/76	Complaint filed. Summons issued.
6/11/76	Answer and crosscomplaint of NYC filed.
6/25/76	Notice of motion ret. 7/9/76 to dismiss filed.
6/29/76	Memorandum of Law in support of motion to dismiss filed.
6/29/76	Notice of Motion ret. 7/9/76 for an order dismissing the action filed.
6/30/76	Notice of motion ret. 7/9/76 for an order dismissing the action filed.
7/2/76	Notice of motion ret. 7/9/76 for an order dismissing the action.
7/6/76	Memorandum of defendants filed.
7/6/76	Notice of motion ret. 7/16/76 for an order dismissing the action filed.
9/1/76	Affidavit in opposition to motions to dismiss filed with plaintiffs' memorandum in opposition.
9/28/76	By PRATT, J. - Order of dismissal as to deft NYC filed.
9/28/76	Reply memorandum of law of deft Monty filed.
9/28/76	ITT reply memorandum of law filed.
9/29/76	Reply memorandum of dfts. Avis Rent-A-Car System, Salvatore Giuffreda, Bernard Nelson, Charles Napolitano and Stuart B. Stillman in support of their motion to dismiss filed.
9/29/76	Reply memorandum of defts. Mackell, Robertson, Ludwig and McKeon in support of defts. motion to dismiss filed.
10/8/76	Before PRATT, J. - Case called for motion to dismiss. Motion argued and decision reserved.
11/9/76	By PRATT, J. - Order dated 11/8/76 dismissing Count III of the complaint filed.
11/9/76	By PRATT, J. - Order dated 11/8/76 dismissing Count IV of the complaint against Avis, S. Giuffreda, B. Nelson, C. Napolitano & S. Stillman filed.
11/30/76	By PRATT, J. - Order dismissing Count 4 of complaint as to pltf. Sta-Brite Auto filed.
11/30/76	By PRATT, J. - Order dismissing Count 4 of complaint as to deft. IT&T filed.
3/18/77	By PRATT, J. - Memo and order granting defts. motion to dismiss the complaint filed.
3/18/77	Judgment that the plaintiffs take nothing of the defendants and the complaint is dismissed filed.
4/13/77	Notice of appeal filed. Copy to C of A.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

G. THOMAS CESTARO, CATHERINE CESTARO, RICHARD MARCHETTI and STA-BRITE AUTO PAINTING CORP.,

Plaintiffs,

-v-

THOMAS J. MACKELL, JAMES D. ROBERTSON, FREDERICK J. LUDWIG, JOSEPH N. MONTY, DAVID J. McKEON, THE CITY OF NEW YORK SALVATORE GIUFFREDA, JOHN SAVAGE, BERNARD NELSON, CHARLES NAPOLITANO, STUART B. STILLMAN, AVIS RENT-A-CAR SYSTEM, INC., and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Defendants.

----------x

COMPLAINT

PLAINTIFFS DEMAND A TRIAL BY JURY

76 Civ. 682 (C.C.P.)

Plaintiffs, by their attorneys, Karpatkin, Pollet & LeMoult, allege:

1. This action arises out of an illegal conspiracy between the Queens County District Attorney's office, under the supervision and control of the then District Attorney, defendant Thomas J. Mackell, and defendants Avis Rent-A-Car System, Inc., and International Telephone & Telegraph Corp. to subvert the criminal justice system for private gain. Plaintiffs, who were innocent victims of this conspiracy, seek compensatory and punitive damages and other relief.

Jurisdiction

2. This action arises under the fourth, fifth, sixth, eighth and fourteenth amendments of the Constitution of the United States and 42 U.S.C. §§ 1983, 1985 and 1986, as hereinafter more fully appears. Jurisdiction is founded on 28 U.S.C. §§ 1331 and 1343. The matter in controversy, exclusive of interests and costs, exceeds the sum of ten thousand dollars.

The Parties

3. At all times relevant to this action, the plaintiffs were and are as follows:

a. G. Thomas Cestaro ("Cestaro"), a resident of Queens County, New York, is the principal owner, officer and operator of Sta-Brite Auto Painting Corporation; Cestaro is also an attorney admitted to practice before the courts of New York State;

b. Catherine Cestaro ("Mrs. Cestaro"), a resident of Queens County, New York, is Cestaro's wife; the motner of three children, she was a part-time secretary employed by Sta-Brite Auto Painting Corporation and held the title of corporate Secretary;

c. Richard Marchetti ("Marchetti"), a resident of Queens County, New York, was, until suspended on April 27, 1971 as part of the illegal conspiracy described herein, employed by defendant Avis Rent-A-Car System, Inc., as a damage control supervisor. Marchetti's responsibility, in part, was to review and approve estimates of auto repair work submitted by Sta-Brite Auto Painting Corporation;

d. Sta-Brite Auto Painting Corporation ("Sta-Brite"), a New York corporation, operated an auto body and repair shop in Jamaica, Queens, New York. From 1962 or 1963 until April 26, 1971, Sta-Brite repaired cars for defendant Avis Rent-A-Car System, Inc., as a contractor mechanic.

4. At all relevant times, the "Mackell defendants" were as follows:

a. Thomas J. Mackell ("Mackell") was District Attorney of Queens County, New York and at the same time was chairman of the board of the Institute for the Advancement of Criminal Justice, which was financed almost entirely by contri-

butions from defendant International Telephone & Telegraph Corp.;

b. James D. Robertson ("Robertson") was Deputy Chief Assistant District Attorney of Queens County, New York, employed by and under the supervision of defendant Mackell, who is also his father-in-law;

c. Frederick J. Ludwig ("Ludwig") was Chief Assistant District Attorney of Queens County, New York, employed by and under the supervision of defendant Mackell. Upon information and belief, from time to time in 1971 and 1972, Ludwig had free use of automobiles supplied by defendant Avis Rent-A-Car System, Inc.;

d. Joseph N. Monty ("Monty") was chief investigator of the Queens County District Attorney's office employed by and under the supervision of defendant Mackell. In March 1974, Monty was convicted of taking a bribe and of official misconduct stemming from his receipt of money and free automobiles from defendant Avis Rent-A-Car System, Inc. in exchange for using the Queens County District Attorney's office as a collection agency for Avis. He was sentenced to a New York State penitentiary for a maximum of four years and upon information and belief is still in prison;

e. David J. McKeon ("McKeon") was an assistant district attorney of Queens County, New York, employed by and under the supervision of defendant Mackell. McKeon was the assistant district attorney assigned to the investigation and criminal prosecution of the plaintiffs herein. Upon information and belief, following the termination of that prosecution, McKeon received free use of automobiles supplied by defendant Avis Rent-A-Car System, Inc.

5. Defendant City of New York ("City") was and is a municipal corporation of the State of New York. At all times mentioned herein, the Mackell defendants and other unnamed persons identified herein as members or employees of the Queens County District Attorney's office or the New York City Police Department were employees and agents of defendant City acting within the scope of their employment.

6. Upon information and belief, in 1971, 1972 and 1973, the "Avis defendants" were as follows:

a. Avis Rent-A-Car System, Inc. ("Avis"), a Delaware corporation whose principal place of business is in Garden City, New York, was and is engaged in the business of renting automobiles to the public;

b. Salvatore Giuffreda ("Giuffreda") was the New York Zone Manager for Avis;

c. John Savage ("Savage") was an assistant vice president of Avis;

d. Bernard Nelson ("Nelson") was a security officer employed by Avis. Upon information and belief, as part of his employment, Nelson arranged for various members of the Queens County District Attorney's office to obtain free use of Avis automobiles;

e. Charles Napolitano ("Napolitano") was an employee of Avis. He testified at the trial of defendant Monty that as part of his employment, he gave Monty $500 in exchange for Monty's assistance in his official capacity to collect a debt owed to Avis;

f. Stuart B. Stillman ("Stillman") was and is an attorney employed by Avis;

g. International Telephone & Telegraph Corporation ("ITT"), a Delaware corporation whose principal place of business was and is in New York, New York, was and is the parent of Avis, owning at all times mentioned herein more than a majority of the outstanding common stock of Avis.

7. At all times mentioned herein, defendants Giuffreda, Savage, Nelson, Napolitano and Stillman were employees and agents of defendants Avis and ITT, acting within the scope of their employment.

8. As is described more fully below, at all times mentioned herein, all the defendants were acting under color of state law.

9. The Mackell defendants, the Avis defendants and defendant City acted as described more fully below in bad faith, with malice and with willful, wanton and reckless disregard for the requirements of law and plaintiffs' rights and without any justification or privilege whatsoever.

The Facts Giving Rise to this Action

10. Upon information and belief, sometime in 1970 or early 1971, defendants Giuffreda, Stillman, Savage, Nelson and other Avis employees concluded that criminal proceedings should be instituted against some or all of plaintiffs for allegedly padding bills submitted by Sta-Brite to Avis and for allegedly not having made all the repairs claimed to have been performed.

11. Thereafter, upon information and belief, defendants Savage and Nelson, acting on behalf of the Avis defendants, met with defendant Robertson and requested that the Queens County District Attorney's office undertake a criminal investigation of plaintiffs and ultimately bring criminal charges against them.

12. Upon information and belief, Robertson introduced Savage and Nelson to defendant Mackell and Mackell and Robertson agreed to Avis's request.

13. Shortly after the meeting of Mackell, Robertson, Savage and Nelson, upon information and belief, Mackell and Robertson assigned defendant McKeon to investigate plaintiffs and ultimately prosecute them. At all times in the course of his assignment, McKeon informed, consulted and acted in concert with the other Mackell defendants and the Avis defendants.

14. After some preliminary investigation, upon information and belief, McKeon or another employee of the Queens County District Attorney's office acting under his direction prepared an alleged grand jury subpoena which was served on plaintiffs Sta-Brite and Cestaro on April 26, 1971.

15. The subpoena was personally served by representatives of defendant Avis, including, upon information and belief, Savage and Nelson, the Queens County District Attorney's office, and the New York Police Department, acting in concert.

16. The subpoena was purportedly signed "So Ordered" by the late Justice Paul Balsam of the Supreme Court of the State of New York and required Sta-Brite to "Deliver forthwith to Bearer" all of its financial and business records.

17. Acting purportedly pursuant to the subpoena, approximately 10 Avis employees, in concert with representatives of the Queens County District Attorney's office, physically confiscated thirty-two Avis cars which Sta-Brite was repairing under its agreement with Avis.

18. Avis gave Sta-Brite a receipt for these cars. This receipt, signed by Giuffreda, was written and signed on

New York City Police Department letterhead stationery.

19. The confiscated cars were not brought to the Police Department pound, however. Upon information and belief, by agreement between McKeon and Nelson the cars were delivered to Avis's facility at JFK International Airport. There the cars were inspected for evidence of criminal behavior on part of plaintiffs' but no such evidence was found. The cars were then dispersed throughout the Avis system.

20. The cars seized purportedly pursuant to the subpoena have never been returned to plaintiffs. Nor has Avis ever paid for the work performed by Sta-Brite on these cars; nor has Avis satisfied Sta-Brite's mechanic lien on these cars. The value of plaintiffs' services on these cars illegally appropriated by defendants without due process or just compensation was at least $15,000.

21. Also purportedly pursuant to the subpoena, employees of the Queens County District Attorney's office with the assistance of Avis and New York Police Department employees, confiscated all of Sta-Brite's business records. These records were driven to the District Attorney's office in a van supplied by Avis and driven by an Avis employee. (These records were ultimately returned to Sta-Brite.)

22. On the day after the raid on Sta-Brite's shop, defendant Giuffreda, on behalf of defendant Avis, suspended plaintiff Marchetti without pay. Avis subsequently terminated Marchetti's employment on June 7, 1971.

23. The subpoena and the seizure of plaintiff Sta-Brite's records and work product and the suspension and termination of plaintiff Marchetti were illegal in every respect.

In acting as described herein, defendants acted without probable cause, indeed, without any legal cause or justification whatsoever. The purposes of defendants' actions, upon information and belief, were solely to harass plaintiffs, to violate their contractual rights and mechanic's liens, and, if possible, to supply previously non-existent evidence of criminal activity.

24. No such evidence was found. Upon information and belief, defendants never found nor presented to a grand jury any evidence of criminal activity on the part of plaintiffs.

25. Nonetheless, acting at the direction of McKeon, in May 1971, a grand jury indicted all four plaintiffs on numerous repetitious counts of grand larceny, conspiracy and other charges arising out of plaintiffs' submission to Avis of allegedly fraudulent bills for repair work totalling $2,469.47. (None of the cars confiscated on April 26, 1971 were the basis of any of the counts of the indictment.)

26. Plaintiffs Cestaro, Mrs. Cestaro and Marchetti were arrested on June 8, 1971 at 6:30 A.M. in their respective homes in full view of their young children and families. They were arrested by employees of the Queens County District Attorney's office, taken to a police station where they were booked, fingerprinted and photographed and then thrown in jail until they were arraigned and released.

27. The indictment and arrest of plaintiffs were illegal in every respect and entirely without probable cause, or any legal justification whatsoever. Plaintiffs were and are entirely innocent of the charges made against them.

28. Defendants sought and received considerable publicity in the press and other news media from the indictment and arrest of plaintiffs. Indeed, upon information and belief,

the press release issued by defendants the day plaintiffs were arrested went far beyond the charges of the indictment. The press release stated in substance that Avis representatives Giuffreda and Savage had complained to the District Attorney about $340,000 worth in allegedly fraudulent repair bills attributable to plaintiffs and that the Queens County District Attorney's office under the direction of defendant Monty had confirmed Avis' charges. No mention was made in the press release that plaintiffs were indicted and arrested for charges stemming from only $2,469 worth of allegedly fraudulent bills.

29. After lengthy delays, the trial of the criminal charges against plaintiffs began on June 8, 1972. The prosecuting attorney was McKeon and the first and only witness to be called was Giuffreda.

30. Defendants exerted great pressure on plaintiffs to plea bargain in order to avoid the exposure, expense, publicity and mental anguish of a trial and in order not to jeopardize Cestaro's license to practice law in this State.

31. In the negotiations leading to a plea, the Mackell and Avis defendants acted jointly. Upon information and belief, Avis employees participated in the negotiations and even spoke directly with the trial judge who also was a party to the negotiations.

32. Defendants exacted a high price for plaintiffs' liberty: Sta-Brite had to plead guilty to one count of grand larceny, third degree, a Class E felony under New York law, and pay a fine of $2500. The remaining charges against Sta-Brite and all the charges against Cestaro, Mrs. Cestaro and Marchetti would be dismissed but only on the condition that Mr. and Mrs. Cestaro execute a limited release in favor of Avis and that Marchetti execute a general release in favor of Avis and the

Queens County District Attorney's office.

33. This extraordinary agreement was approved by Ludwig who, upon information and belief, insisted that Sta-Brite plead guilty to a felony even though there was no evidence that Sta-Brite or any of the plaintiffs had committed any crime at all and the judge had suggested a misdemeanor plea.

34. Sta-Brite pleaded guilty on June 9, 1972 without admitting any wrongdoing of any sort, a procedure permitted under New York law.

35. The releases that plaintiffs signed and that were delivered, upon information and belief, by the Queens County District Attorney's office to Avis were obtained illegally, by coercion and under duress, without due process and in violation of the eighth and fourteenth amendments to the Constitution of the United States and were willfully exacted by defendants solely to cover-up their illegal actions and to attempt to preclude plaintiffs from obtaining redress for the violations of their rights.

The Mackell - Avis Conspiracy

36. The investigation and prosecution of plaintiffs did not represent a legitimate exercise of the powers of a district attorney. Rather, upon information and belief, the Mackell defendants acted pursuant to a long-standing agreement and conspiracy with the Avis defendants to use the power and authority of the Queens County District Attorney's office to enforce the private interests and whims of the Avis defendants in return for money and other favors supplied by Avis to the Mackell defendants.

37. In addition to the facts previously alleged herein, upon information and belief, the following are other examples of some of the "gratuities" supplied by the Avis defendants to the Mackell defendants:

a) In 1968 and 1969 Mackell received free use of cars supplied by Avis; Mackell used these cars as his official limosine;

b) From 1969 through 1973, defendant ITT contributed $183,860 to the Institute for the Advancement of Criminal Justice which was run by Mackell and members of his staff. Mackell used the Institute's funds in large part to finance his travel and that of other employees of the Queens County District Attorney's office to the Virgin Islands, Alaska and other places, and to pay "consultant fees" and "honoraria" to members of Mackell's staff.

c) Avis supplied free automobiles from time to time to defendants Ludwig, Monty, McKeon and other persons employeed by the Queens County District Attorney's office;

d) Defendant Napolitano testified at Monty's trial that he gave Monty $500 plus free use of Avis cars in return for Monty's aid in collecting debts owed to Avis and for other favors.

38. That the Mackell defendants and the Avis defendants were engaged in an illegal conspiracy to violate their rights was unknown to and concealed from plaintiffs during the investigation and prosecution described herein. Plaintiffs did not learn of the existence of this conspiracy and that they were the targets and victims of it until testimony was presented at public hearings held by the New York State Joint Legislative

Committee on Crime on May 3 and October 11, 1973 and until the trial of defendant Monty in February and March 1974.

39. Upon information and belief, it was part of the agreement and conspiracy between the Mackell and the Avis defendants to conceal their conspiracy from members of the general public and from plaintiffs.

40. It was also part of the conspiracy, upon information and belief, to discredit the plaintiffs and attempt to buy their silence when some of the facts of the conspiracy first became known.

41. In September 1973 a former Avis employee, acting (upon information and belief) with the knowledge and approval and at the suggestion of defendant Stillman and on behalf of Avis, offered plaintiff Cestaro a large sum of money if the plaintiffs would have the State Legislative Committee call off its investigation. Stillman personally repeated the same offer to Cestaro on October 1973. Cestaro refused both offers.

Plaintiffs' Damages

42. Because of defendants' actions, the plaintiffs have suffered considerable damages, including, without limitation, the following:

a) Avis withdrew all of its business from Sta-Brite;

b) Upon information and belief, many other persons and insurance companies ceased doing business with Sta-Brite or declined to do new business with Sta-Brite which they otherwise would have done;

c) As a result, Sta-Brite's business declined drastically as did the income and salary derived therefrom by Cestaro and Mrs. Cestaro;

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d) Sta-Brite was never paid for the work performed on the cars confiscated by Avis and its mechanic's lien on these cars has never been satisfied;

e) Marchetti was terminated by Avis on the day before his arrest and he has never since been able to find employment commensurate with his skills, experience and salary while at Avis;

f) All the plaintiffs accumulated considerable debts because of the decline in business and loss of salary and employment;

g) All the plaintiffs had to pay attorneys fees to defend them in the criminal action and Sta-Brite paid a fine of $2500;

h) All the plaintiffs suffered grievous injury to their reputations and standing in the community and among their friends, families and colleagues; and

i) The three individual plaintiffs suffered great personal humiliation, mental anguish and suffering and physical injury.

43. As a result of defendants' actions, plaintiffs were damaged in an amount not less than $1,000,000.

44. Because defendants acted in bad faith with malice, without any legal justification whatsoever and with wanton and reckless disregard for plaintiffs' rights, plaintiffs also ask exemplary or punitive damages in an amount not less than $1,000,000.

COUNT ONE AGAINST ALL DEFENDANTS

45. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-44 herein.

46. Defendants violated plaintiffs' rights and privi-

leges under the fourth, fifth, sixth, eighth, and fourteenth amendments to the Constitution of the United States.

COUNT TWO AGAINST THE MACKELL AND THE AVIS DEFENDANTS

47. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-44 and 46 herein.

48. Acting under color of state law, the Mackell and the Avis defendants, in violation of 42 U.S.C. § 1983, deprived plaintiffs of rights, privileges and immunities secured to them by the Constitution and laws of the United States.

COUNT THREE AGAINST THE MACKELL AND THE AVIS DEFENDANTS

49. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-44, 46 and 48 herein.

50. The Mackell and the Avis defendants conspired, in violation of 42 U.S.C. §§ 1985 and 1986, to obstruct justice, to injure plaintiffs and their property, to single plaintiffs out and deny them equal protection of the laws, to prevent or hinder the lawful authorities of New York State from giving or securing plaintiffs equal protection of the laws and to neglect or refuse to prevent or aid in the prevention of said wrongs.

COUNT FOUR AGAINST ALL DEFENDANTS FOR DECLARATORY RELIEF

51. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-44, 46, 48 and 50 herein.

52. Jurisdiction of this Court is founded on 28 U.S.C. §§ 2201 and 2202.

53. The indictment and arrest of the plaintiffs and

the conviction of Sta-Brite were void and obtained in violation of plaintiffs' constitutional rights.

WHEREFORE, plaintiffs demand judgment against the defendants' as follows:

a) on Counts One, Two and Three, compensatory damages in the sum of $1,000,000 and punitive damages in the sum of $1,000,000, plus interest, costs and reasonable attorneys fees;

b) on Count Four, declaring the indictment and arrest of plaintiffs and the conviction of Sta-Brite null and void and ordering that all records of the indictment, arrest and conviction maintained by any governmental entity be expunged; and

c) such other and further relief as the Court may deem just and proper.

Dated: New York, New York
April 12, 1976

KARPATKIN, POLLET & LeMOULT

By Marshall Beil
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

G. THOMAS CESTARO, CATHERINE CESTARO, RICHARD MARCHETTI and STA-BRITE AUTO PAINTING CORP.,

Plaintiffs,

-against-

THOMAS J. MACKELL, JAMES D. ROBERTSON, FREDERICK J. LUDWIG, JOSEPH N. MONTY, DAVID J. McKEON, THE CITY OF NEW YORK, SALVATORE GIUFFREDA, JOHN SAVAGE, BERNARD NELSON, CHARLES NAPOLITANO, STUART E. STILLMAN, AVIS RENT-A-CAR SYSTEM, INC. and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Defendants.

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76 Civ. 682 (GCP)

NOTICE OF MOTION

[Avis Defendants]

S I R :

PLEASE TAKE NOTICE, that upon the complaint herein, the indictments of G. Thomas Cestaro, Catherine Cestaro, Richard Marchetti and Sta-Brite Auto Painting Corp. and the transcript of the guilty plea of Sta-Brite Auto Painting Corp. (copies of which are annexed as exhibits hereto), the undersigned attorneys for defendants Avis Rent-A-Car System, Inc., Salvatore Giuffreda, Bernard Nelson, Charles Napolitano and Stuart E. Stillman will move this Court, before the Honorable George C. Pratt, U.S.D.J., in Courtroom 6 of the United States Courthouse located at 225 Cadman Plaza East, Brooklyn, New York, at 9:30 a.m. on July 9, 1976, or as soon thereafter as counsel can be heard, for an order, pursuant to Federal Rule of Civil Procedure 12(b)(6), dismissing the complaint on the grounds that:

(a) plaintiffs' claims are barred by the applicable statutes of limitations;

(b) plaintiffs' claims are barred by res judicata and collateral estoppel;

(c) count three of the complaint fails to state a claim for which relief can be granted under 42 U.S.C. §§1985 and 1986; and

(d) count four of the complaint fails to state a declaratory judgment claim for which relief can be granted as against defendants Avis Rent-A-Car System, Inc., Salvatore Giuffreda, Bernard Nelson, Charles Napolitano and Stuart B. Stillman;

and granting defendants Avis Rent-A-Car System, Inc., Salvatore Giuffreda, Bernard Nelson, Charles Napolitano and Stuart B. Stillman such other and further relief as this Court deems just and proper.

Dated: New York, N.Y.
June 24, 1976

PROSKAUER ROSE GOETZ & MENDELSOHN

By _____
A Member of the Firm

Attorneys for Defendants
Avis Rent-A-Car System, Inc.,
Giuffreda, Nelson, Napolitano
and Stillman
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(212) 593-9000

TO: KARPATKIN, POLLET & LeMOULT
Attorneys for Plaintiffs
1345 Avenue of the Americas
New York, New York 10019
(212) 765-2700

[Exhibits Omitted]

[CAPTION OMITTED]

NOTICE OF MOTION TO DISMISS
(ITT)

S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavit of Elihu Inselbuch, Esq., sworn to June 24, 1976, and upon the notice of motion dated June 24, 1976 and the exhibits annexed thereto in support of the motion to dismiss of defendants Avis Rent-A-Car System, Inc., Salvatore Giuffreda, Bernard Nelson, Charles Napolitano and Stuart B. Stillman, and upon all the pleadings and prior proceedings heretofore had herein, the undersigned will move this Court on the 9th day of July, 1976 at 10:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard, for an Order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing the Complaint on the grounds that plaintiffs' claims are barred by the applicable statutes of limitations and that plaintiffs' have failed to state claims upon which relief can be granted under 42 U.S.C. §§ 1985 and 1986 and under 28 U.S.C. §§ 2201 and 2202, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
June 24, 1976

Yours, etc.

GILBERT, SEGALL and YOUNG

By: _____
(A Member of the Firm)
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International Telephone and
Telegraph Corporation
Office and P.O. Address
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

G. THOMAS CESTARO, CATHERINE CESTARO, RICHARD MARCHETTI and STA-BRITE AUTO PAINTING CORP.,

Plaintiffs,

- against -

THOMAS J. MACKELL, JAMES D. ROBERTSON, FREDERICK J. LUDWIG, JOSEPH N. MONTY, DAVID J. McKEON, THE CITY OF NEW YORK, SALVATORE GIUFFREDA, JOHN SAVAGE, BERNARD NELSON, CHARLES NAPOLITANO, STUART B. STILLMAN, AVIS RENT-A-CAR SYSTEM, INC., and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Defendants.

----------X

INSELBUCH AFFIDAVIT IN SUPPOR OF MOTION (ITT)

AFFIDAVIT

76 Civ. 682 (GCP)

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

ELIHU INSELBUCH, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and of the firm of Gilbert, Segall and Young, attorneys for defendant International Telephone and Telegraph Corporation ("ITT"). I make this affidavit in support of ITT's motion for an Order dismissing the Complaint.

2. I have reviewed the notice of motion dated June 24, 1976, the exhibits annexed thereto and the memorandum of law offered in support of the motion to dismiss of defendants Avis-Rent-A-Car System, Inc. ("Avis"), Salvatore Giuffreda, Bernard Nelson, Charles Napolitano and Stuart B. Stillman (the "Avis defendants"). The within motion is predicated upon the same factual circumstances and points and authorities relied upon by the Avis defendants.

3. In addition, it is respectfully urged that the Complaint is devoid of any allegation of wrongful conduct, or agreement to take part in wrongful conduct, on the part of any agent or employee acting exclusively on behalf of ITT. The only individual factual allegations made against ITT are ITT's contribution to a not-for-profit corporation (Complaint paragraphs 4(a) and 37(b)) and ITT's ownership of a majority stock interest in Avis (Complaint paragraph 6(g)). These two allegations do not even assert participation in any alleged wrongful conduct. For this additional reason, the Complaint clearly fails to state any claim against ITT upon which relief can be granted.

4. It is respectfully requested that the matters set forth in support of the motion made by the Avis defendants be considered by the Court in conjunction with the within motion and that ITT's motion to dismiss be granted for the same reasons advanced by the Avis defendants and that ITT have such other and further relief as to this Court may seem just and proper.

ELIHU INSELBUCH

Sworn to before me this
24th day of June, 1976

JOAN WEISS
Notary Public, State of New York
No. 41-4207155
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1978

[CAPTION OMITTED]

NOTICE OF MOTION TO DISMISS
(MACKELL Defendants)

76 C 822

S I R S :

PLEASE TAKE NOTICE that upon the summons and complaint, the undersigned will move this Court at a motion term thereof before the Hon. George C. Pratt, United States District Judge, United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York on July 16, 1976 at 10 a.m. or as soon thereafter as counsel may be heard for an order dismissing the complaint herein against defendants Mackell, Ludwig, Robertson and McKeon and for such other relief as to the Court seems just and proper.

Dated: New York, New York
June 30, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Mackell, Ludwig, Robertson
and McKeon
By

s/
ARLENE R. SILVERMAN
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7657

TO: KARPATKIN POLLET
& LeMOULT
Attorneys for Plaintiff
1345 Avenue of the Americas
New York, New York 10019

76 C 822

[CAPTION OMITTED]

NOTICE OF MOTION TO DISMISS THE COMPLAINT AND FOR SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT JOSEPH MONTY

S I R :

PLEASE TAKE NOTICE that upon the annexed affidavit of SPIROS A. TSIMBINOS, sworn to the 24th day of June, 1976, and upon the summons, complaint, and all the pleadings herein, the undersigned, on behalf of the defendant JOSEPH MONTY, will move this court at the courthouse, Foley Square, New York, New York, on the 9th day of July, 1976, before the HONORABLE MARK A. CONSTANTINO, pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure to dismiss the complaint herein on the grounds that (1) it is barred by the applicable statute of limitations, and (2) it fails to state a claim upon which relief can be granted, and pursuant to Rule 56(b) for summary judgment in favor of the defendant, and for such other and further relief as to this Court may seem just and proper.

Dated: Kew Gardens, New York
June 24, 1976

Yours, etc.,

SPIROS A. TSIMBINOS
Attorney for Defendant
JOSEPH MONTY
Office and Post Office Address
125-10 Queens Boulevard
Kew Gardens, New York 11415

TO: KARPATKIN, POLLET & LeMOULT, ESQS.
Attorneys for Plaintiffs
1345 Avenue of the Americas
New York, New York 10019

TSIMBINOS AFFIDAVIT IN SUPPORT OF MOTION (MONTY)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

76 C 822

G. THOMAS CESTARO, CATHERINE CESTARO, RICHARD MARCHETTI and STA-BRITE AUTO PAINTING CORP.,

AFFIDAVIT

Plaintiffs,

- against -

THOMAS J. MACKELL, JAMES D. ROBERTSON, FREDERICK J. LUDWIG, JOSEPH N. MONTY, DAVID J. McKEON, THE CITY OF NEW YORK, SALVATORE GIUFFREDA, JOHN SAVAGE, BERNARD NELSON, CHARLES NAPOLITANO, STUART B. STILLMAN, AVIS RENT-A-CAR SYSTEM, INC., and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Defendants.

----------X

STATE OF NEW YORK)
: ss.:
COUNTY OF QUEENS)

SPIROS A. TSIMBINOS, being duly sworn, deposes and says:-

I am an attorney duly admitted to practice before the United States District Court for the Eastern District of New York, and am the attorney for the defendant JOSEPH MONTY. I submit this affidavit in support of defendant's motion to dismiss the complaint and for summary judgment in favor of the defendant.

1. The complaint of the plaintiffs allege certain incidents commencing from June 8, 1971 to June 9, 1972. The action of the plaintiffs is barred by the applicable statute of limitations. The Courts of this Circuit have expressly held that the applicable statute of limitations in a Federal Civil Rights case brought in New York, of the

type alleged in the case at bar is three years. See Kaiser v. Cahn, 510 F.2d 282 (2nd Cir., 1974); Romer v. Leary, 425 F.2d 186 (2nd Cir., 1970); Montagna v. O'Hagan, 402 F.Supp. 178 (E.D.N.Y., 1975). Since the incidents alleged in the complaint occurred some four years prior to the filing of the instant action, the plaintiffs are clearly barred by the statute of limitations.

2. A detailed reading of the allegations in the plaintiffs' complaint also reveals that with regard to the defendant, JOSEPH MONTY, no specific allegations of misconduct are made against him. The complaint merely alleges on page 3, paragraph "d" that "Joseph N. Monty ('Monty') was chief investigator of the Queens County District Attorney's office employed by and under the supervision of defendant Mackell." There are no allegations in the complaint that the defendant Monty personally participated in any of the incidents raised by the plaintiffs. In actuality, the facts will reveal that the defendant Joseph Monty was in no way personally involved in any of the incidents alleged except that as chief investigator he assigned certain members of his bureau at the behest of the assistant district attorney handling the case to assist in the investigation.

3. It appears clear from the reading of the complaint that Mr. Monty's name has been injected into the matter merely because a conviction was obtained against Mr. Monty in another but totally unrelated matter. The plaintiffs thus merely seek to embellish their erroneous allegations by bringing Mr. Monty into this action.

4. It should also be noted that the allegations made in plaintiffs complaint, page 11, paragraph "d", that Mr. Monty received $500. from an employee of Avis is specifically refuted by the fact that Mr. Monty was acquitted of that charge during his trial.

5. The action of the plaintiffs should be further barred by the fact that Sta-Brite Auto Painting Corp., of which Mr. and Mrs. Costaro were employees and officers, did plead to a Felony on June 9, 1972, thereby admitting guilt of the charges brought.

6. It should be noted that no appeal was perfected and that no action regarding these allegations were raised by the plaintiffs until this time, more than four (4) years after the incident. As admitted in the plaintiffs complaint releases were also specifically given by the plaintiffs with regard to any civil action in this matter.

WHEREFORE, it appears clear that the plaintiffs' allegations are totally frivolous and without merit, fail to state a claim against the defendant, Joseph Monty, and are barred by the applicable statute of limitations. For all these reasons the complaint should be dismissed and summary judgment granted in favor of the defendant.

Spiros A. Tsimbinos

SPIROS A. TSIMBINOS

Sworn to before me this

24th day of June, 1976.

Phyllis D. Bennett

Notary Public

PHYLLIS D. BENNETT
Notary Public, State of New York
No. 41-4511090
Qualified in Queens County
Commission Expires March 30, 1975
1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

G. THOMAS CESTARO, et al.,	:	
Plaintiffs,	:	74 Civ. 682 (GCP)
-against-	:	AFFIDAVIT IN OPPOSITION TO MOTIONS TO DISMISS
THOMAS J. MACKELL, et al.,	:	
Defendants.	:	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

G. THOMAS CESTARO, being duly sworn, says:

1. I am one of the plaintiffs in this action.

2. The purpose of this affidavit is to state for the record the facts underlying this action which were concealed from me, my wife and Sta-Brite Auto Painting Corp. until disclosed at public hearings held by the New York State Joint Legislative Committee on Crime in May and October 1973.

3. None of us knew the following facts, among others, until they were brought out at the committee hearings:

(a) Avis was supplying free cars to Queens District Attorney Mackell, his son-in-law and Deputy Chief Assistant Robertson, his Chief Assistant Ludwig, and Assistant Direct Attorney McKeon;

(b) ITT, Avis' parent company, had contributed over $180,000 to a "charitable foundation" for the sole use and benefit of Mackell, his family and staff;

(c) Mackell's Chief Investigator Monty received

cash payments for Avis (although we had received some indication prior to the hearings that Monty had had free use of an Avis car);

(d) Avis employee Nelson had arranged for the Avis cars to be supplied to the District Attorney's office;

(e) Avis employees Savage and Nelson personally met with Mackell and Robertson at which time the four of them agreed to undertake a criminal investigation of us and bring phony criminal charges against us;

(f) McKeon was the Assistant District Attorney who prepared the "subpoena" served on Sta-Brite on April 26, 1971;

(g) Avis' participation in the raid on Sta-Brite was not innocent and legitimate;

(h) The raid itself was not conducted for legitimate law enforcement purposes, but was the result of Avis' and ITT's payoffs to Mackell and his associates;

(i) The entire criminal prosecution, including the coerced plea bargain, was not a legitimate exercise of the lawful functions of the District Attorney's office but part of the Avis-Mackell financial arrangement.

4. Until these facts were brought out at the public hearings, we were entirely in the dark concerning the illicit relationship between Avis-ITT and Mackell and his staff, and were completely unaware of the illegitimate purpose underlying the criminal case brought against us.

5. We were not in the position to learn of any of these facts until the committee hearings because we did not have access to defendant's personnel or documents and did not have subpoena power to compel disclosure of these facts.

6. We did all we could to learn about the criminal charges against us. Our lawyers, together with Mr. Marchetti's lawyer, for example, filed a motion to inspect the grand jury minutes.

7. This motion was denied. We later learned at the committee hearings that the judge who denied our motion to inspect the grand jury minutes had never once granted such a motion in all his years on the bench. I am still trying to learn whether defendants had any role in assigning that judge to hear our motion.*

8. Thus, I strongly believe that although we were as diligent as we could be, we still could not have brought this federal action against these defendants until after the committee hearings in May and October 1973.

G. Thomas Cestaro

Sworn to before me this

26th day of August, 1976.

Marshall Beil

MARSHALL BEIL
Notary Public, State of New York
No. 31-9820874
Qualified in New York County
Commission Expires March 30, 1978

* As further evidence of these facts, I am attaching a copy of an affirmation by the counsel to the State Crime Committee which was submitted in state court proceedings subsequent to the Committee's hearings.

EXHIBIT TO CESTARO AFFIDAVIT

SUPREME COURT: CRIMINAL TERM
QUEENS COUNTY

People of the State of New York	:	
against	:	IND. NO. 1666-71
Sta-Brite Auto Painting Corp. and G. Thomas Cestaro, et al	:	AFFIDAVIT

Jeremiah B. McKenna, a member of the Bar of the State of New York, under penalty of perjury, affirms as follows:

1. I am Counsel to the New York State Select Committee on Crime, which has been investigating the conflicts of interest that inhered in the conduct of members of the Queens District Attorney's office staff in the course of this prosecution. This Committee has been asked by the attorney for the defendants, G. Thomas Cestaro and wife, to submit an affidavit to assist the Court in its consideration of the instant motion. This affidavit is submitted by this affiant who has been directly involved in the Committee's investigation and has personal knowledge of the facts recited below.

2. The Committee's investigation developed evidence that the Chief Investigator of the Queens District Attorney's office, Joseph Monty, during the time the investigation that led to the indictment herein was underway, was receiving the free use of rental cars from the Avis Corp., the complainant in this case. We are informed that some of this evidence was presented in the recent trial of Joseph Monty by the special prosecutor of the State of New York, Maurice Nadjari. The Committee also developed evidence that the Assistant District Attorney in charge of this case, Thomas McKeon, after the conclusion of this case in April, received the free use of an automobile from Avis Corp. during his summer vacation in July. Further evidence was developed that the parent corporation of Avis, The International Telephone and Telegraph Corp, ITT, had made substantial contributions to a foundation directed by the former District Attorney of Queens County, Thomas Mackell, during the time this investigation and prosecution was underway. The District Attorney himself, several Assistant District Attorneys and other members of the staff of the Queens District Attorney's office were sent to the Virgin Islands and other cities in the United States, expenses paid, in connection with projects supported by grants from ITT.

3. The Committee's investigation further revealed that when the representatives of the Avis Corp. presented their complaint in this case, they were not treated as ordinary complainants but were interviewed by the District Attorney personally, by the then Chief Assistant District Attorney, Mr. Robertson, and that Mr. Robertson was kept constantly informed on the progress of the investigation by Assistant District Attorney McKeon.

4. The Committee's inquiry also found that rather extraordinary investigative devices were used by the Queens District Attorney's office in the course of their investigation of this case. For example, a grand jury subpoena duces tecum was used as a search warrant to remove from the premises of Sta-Brite several filing cabinets of records and numerous automobiles in various stages of repair. The grand jury subpoena in question bore the notation "deliver to bearer forthwith" and was signed by Justice Paul Balsam of the Queens Supreme Court, now deceased. On the day the subpoena was served, the evidence was taken from Sta-Brite. It was the opinion of the members of the New York State Select Committee on Crime that the evidence obtained in this fashion was, in fact, illegally seized from the defendant, and was thus tainted when presented to the grand jury.

5. The most significant conclusion reached by the Committee in the course of its investigation was that there was no evidence, legal or illegal, presented to the grand jury that returned the indictment in this case which in any way connected G. Thomas Cestaro, his wife, or Richard Marchetti to the crimes charged in the indictment. Your affiant believes that if the court were to inspect the grand jury minutes supporting this indictment, it would reach the same conclusion.

6. The Committee is aware that a motion to inspect the grand jury minutes and dismiss the indictment in this case was made by the attorneys for the defendants. That motion came on before Justice Balsam, the same judge who authorized the illegal subpoena-search warrant in this case. Justice Balsam denied the motion. When we inquired of Justice Balsam's law secretary how the judge could have denied the motion to inspect in light of the evidence presented to the grand jury, the law secretary informed us that Justice Balsam in his years on the Queens County Supreme Court bench had never granted a motion to inspect the grand jury minutes and dismiss the indictment.

7. This Committee stands ready to make available to the Court in its deliberations on this motion should the Court so direct, the minutes of its hearings in public or executive session, the grand jury minutes obtained pursuant to Court order and for that reason kept in confidence by this Committee, and any other evidence which the Court may deem necessary to its deliberation.

s/
Jeremiah B. McKenna

May 29, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

G. THOMAS CESTARO, et al., :

Plaintiffs, : 74 Civ. 682 (GCP)

-against- : AFFIDAVIT IN OPPOSITION TO MOTIONS TO DISMISS

THOMAS J. MACKELL, et al., :

Defendants. :

----------x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RICHARD MARCHETTI, being duly sworn, says:

1. I am one of the plaintiffs in this action.

2. I have read the affidavit of co-plaintiff G. Thomas Cestaro, and wish to state that I agree with and adopt his statements concerning the concealment of the conspiracy between Avis and ITT and Mackell and his associates, our lack of knowledge of these facts and our inability to uncover them prior to the hearing.

3. I too was wholly unaware of the financial arrangement among the defendants.

4. For the same reasons as stated in Mr. Cestaro's affidavit, I did not know, and could not have known, that when Avis suspended and then fired me that they were not acting legitimately.

5. Until the public hearings I did not know that Avis was paying off the District Attorney's office and that my firing was part of their conspiracy against the Cestaros and me.

6. Like the Cestaros, I was unable to learn about the Avis-Mackell arrangement. For example, when I tried to talk to my superior about the reasons for my suspension, he refused to discuss it.

7. I too could not have brought this action until after the committee hearings.

8. For the Court's information, I am attaching a copy of the transcript of the criminal trial. As the Court can see, the trial lasted only a half-day before it ended in the plea bargain defendants forced down our throats.

Richard Marchetti

Sworn to before me this

26th day of August, 1976.

Marshall Bell

MARSHALL BELL
Notary Public, State of New York
No. 31-9000074
Qualified in New York County
Commission Expires March 30, 1978

[Exhibit Omitted]

76 CIV. 682 (GCP)

STIPULATION OF DISMISSAL AS TO DEFENDANT CITY OF NEW YORK

[CAPTION OMITTED]

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned, that this action may be dismissed as against defendant THE CITY OF NEW YORK only, without prejudice and without costs, pursuant to Fed. R. Civ. P. 41(a)(2).

Dated: September 17, 1976.

KARPATKIN, POLLET & LeMOULT

By Marshall Beil
Marshall Beil,
Attorneys for Plaintiffs
1345 Avenue of Americas
New York, New York 10019
212 - 765-2700

W. BERNARD RICHLAND
Corporation Counsel

9/22/76

By _____
Attorney for Defendant THE CITY OF NEW YORK

SO ORDERED:

Dated: Brooklyn, New York,
September 28, 1976.

S/ Jerome C. Pratt
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

G. THOMAS CESTARO, et al.,

Plaintiffs,

-against-

THOMAS J. MACKELL, et al.,

Defendants.

----------x

76 CIV. 682 (GCP)

STIPULATIONS OF DISMISSAL AS TO COUNT III and IV

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, that Count III of the complaint may be dismissed without prejudice and without costs, pursuant to Fed. R. Civ. P. 41(a)(2).

[SIGNATURES OF PARTIES OMITTED]

* * *

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, as follows:

1. Count III of the complaint may be dismissed without prejudice and without costs, pursuant to Fed.R.Civ.P. 41(a)(2).

2. Court IV of the complaint may be dismissed as to defendants Avis Rent-A-Car System, Inc., Salvatore Giuffreda, Bernard Nelson, Charles Napolitano and Stuart B. Stillman without prejudice and without costs pursuant to Fed.R.Civ.P. 41(a)(2).

[SIGNATURES OF PARTIES OMITTED]

SO ORDERED:

Dated: Brooklyn, New York
~~October~~ November 8, 1976.

S/ George C. Pratt
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

G. THOMAS CESTARO, et al.,

Plaintiffs,

-against-

THOMAS J. MACKELL, et al.,

Defendants.

----------x

76 Civ. 682 (GCP)

STIPULATIONS AS TO COUNT FOUR

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, that Count Four of the complaint may be dismissed as to defendant International Telephone & Telegraph Corporation without prejudice and without costs pursuant to Fed. R.Civ.P. 41(a)(2).

[SIGNATURES OF PARTIES OMITTED]

* * *

IT IS HEREBY STIPULATED AND AGREED by and among the undersigned that Count Four of the Complaint solely insofar as it relates to the conviction of plaintiff Sta-Brite Auto Painting Corp. may be dismissed without prejudice and without costs, pursuant to Fed.R.Civ.P. 41(a)(2).

Dated: November 15, 1976.

[SIGNATURES OF PARTIES OMITTED]

SO ORDERED:
Dated: Brooklyn, New York
November 30, 1976.

s/ George C. Pratt
U.S D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

G. THOMAS CESTARO, CATHERINE CESTARO, RICHARD MARCHETTI and STA-BRITE AUTO PAINTING CORP.,

Plaintiffs,

- against -

THOMAS J. MACKELL, JAMES D. ROBERTSON, FREDERICK J. LUDWIG, JOSEPH N. MONTY, DAVID J. McKEON, THE CITY OF NEW YORK, SALVATORE GIUFFREDA, JOHN SAVAGE, BERNARD NELSON, CHARLES NAPOLITANO, STUART B. STILLMAN, AVIS RENT-A-CAR SYSTEM, INC., and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Defendants.

- x

DOCKET NO. 76 C 682

MEMORANDUM AND ORDER

PRATT, J:

Defendants have moved to dismiss this civil rights action. For the reasons set forth below, the court finds that the action is time-barred and that defendants' motions must therefore be granted. The following discussion necessarily assumes the complaint's allegations to be true.

THE COMPLAINT

The Parties.

The complaint names as plaintiffs: Sta-Brite Auto

Painting Corporation, G. Thomas Cestaro, Catherine Cestaro, and Richard Marchetti. Sta-Brite is a New York corporation, which from 1963 until April 26, 1971, repaired cars for defendant Avis Rent-A-Car Systems, Inc., as a contractor mechanic. Mr. Cestaro was the principal owner, officer, and operator of Sta-Brite. His wife, Mrs. Cestaro, was a part-time secretary for Sta-Brite and held the title "Corporate Secretary". Plaintiff Marchetti was employed by Avis as a damage control supervisor until Avis suspended him on April 27, 1971, and finally terminated his employment on June 7, 1977.

The complaint names as defendants: Thomas J. Mackell, James D. Robertson, Frederick J. Ludwig, Joseph N. Monty, David T. McKeon, Avis Rent-A-Car Systems, Inc., (Avis) Salvatore Giuffreda, John Savage,[1/] Bernard Nelson, Charles Napolitano, Stuart B. Stillman, International Telephone and Telegraph Corporation (ITT), and the City of New York.[2/]

At all relevant times, defendant Mackell was District Attorney of Queens County and Chairman of the Board of the Institute of Criminal Justice. Defendants Robertson, Ludwig, Monty, and McKeon held positions in Mackell's office as Deputy Chief Assistant District Attorney, Chief Assistant

District Attorney, Chief Investigator, and Assistant District Attorney, respectively. The complaint refers to these defendants as the "Mackell defendants".

The complaint characterizes the remaining defendants as the "Avis defendants". They include: Avis; Giuffreda, the New York Zone Manager for Avis; Savage, an assistant vice-president of Avis; Nelson, a security officer for Avis; Napolitano, an Avis employee; Stillman, an Avis attorney; and ITT, the corporate parent of Avis.

Plaintiffs' Claims.

Invoking the fourth, fifth, sixth, eighth, and fourteenth amendments and 42 USC §1983, [3/] plaintiffs seek monetary, declaratory, and injunctive relief to remedy injuries allegedly incurred because of the defendants' conspiratorial violations of their civil rights.

Plaintiffs allege that "the Mackell defendants acted pursuant to a long-standing agreement and conspiracy with the Avis defendants to use the powers and authority of the Queens County District Attorney's office to enforce the private interests and whims of the Avis defendants in return for money and other favors supplied by [the] Avis [defendants]

to the Mackell defendants." Plaintiffs support this general contention with the following specific allegations: that from 1969 through 1973 ITT contributed $183,860 to the Institute for Advancement of Criminal Justice, an organization financed almost entirely by ITT and run by Mackell and his staff; that Mackell used the Institute's funds in large part to finance his travel and that of other employees of his office and to pay "'consultant fees'" and "'honoraria'" to members of his staff; that Avis supplied free automobiles to Mackell, Ludwig, Monty, McKeon and other employees of Mackell's office; and that Avis-defendant Napolitano has testified that he gave Mackell-defendant Monty $800 and free use of Avis cars in return for Monty's aid in collecting debts owed to Avis and other favors.

The complaint asserts that the alleged conspiracy injured the plaintiffs as follows:

Sometime in 1970 or early 1971, Avis defendants Giuffreda, Stillman, Savage, and Nelson concluded that some of the plaintiffs should be criminally prosecuted for Sta-Brite's alleged submission of fraudulent repair bills to Avis. Accordingly, Savage and Nelson, acting on behalf of the other Avis-defendants, met with Mackell-defendant Robertson and

requested that the Queens County District Attorney's office investigate and prosecute Sta-Brite and the Cestaros. Robertson introduced Savage and Nelson to Mackell, and Mackell and Robertson agreed to the Avis-defendants' request. Mackell and Robertson then assigned McKeon to investigate and prosecute the plaintiffs. Fully aware of his role in the conspiracy, McKeon caused to be prepared "an alleged grand jury subpoena" requiring Sta-Brite to turn over its business records. The subpoena was served on Sta-Brite and Mr. Cestaro on April 26, 1971. Purporting to act pursuant to this subpoena, employees of both Avis and the Queens County District Attorney's office confiscated not only all of Sta-Brite's business records, but also 32 Avis cars which Sta-Brite was repairing under an agreement with Avis. The cars were taken to an Avis facility, and were never returned to Sta-Brite. Moreover, Avis never paid for the work performed on them.

On April 27, 1971, the day after the seizure of the business records and cars from Sta-Brite, plaintiff Marchetti was suspended without pay by Avis-defendant Giuffreda. Marchetti was fired on June 7, 1971.

In May of 1971, Mackell-defendant McKeon obtained

a groundless incidtment of all four plaintiffs on numerous counts of grand larceny, conspiracy and other charges allegedly arising out of the plaintiffs' submission of fraudulent bills to Avis for repair work totalling $2,469.47. Mr. Cestaro, Mrs. Cestaro and Marchetti were arrested and jailed on June 8, 1971. They were later arraigned and released.

The defendants then issued a press release which greatly exaggerated the charges made in the plaintiffs' indictment.

The trial of the charges against the plaintiffs did not begin for a year, on June 8, 1972. McKeon was the prosecuting attorney. But before the trial's completion, the Mackell and Avis defendants jointly coerced the plaintiffs into accepting an agreement whereby: Sta-Brite pled guilty to one count of grand larceny in the third degree, a Class E felony under New York law; Mr. and Mrs. Cestaro executed a limited release in favor of Avis; Marchetti executed a general release in favor of Avis and the Queens County District Attorney's office; and the District Attorney's office in return moved to dismiss the remaining charges against Sta-Brite and all the charges against Mr. Cestaro, Mrs. Cestaro, and Marchetti.

According to the complaint, throughout their dealings with the plaintiffs, the defendants acted "in bad faith, with malice and with willful, wanton and reckless disregard for the requirements of law and plaintiffs' rights, and without any justification or privilege whatsoever". Specifically, plaintiffs allege that the defendants intended "to harass plaintiffs, to violate their contractual rights and mechanic's liens, and, if possible, to supply previously non-existent evidence of criminal activity".

The complaint further asserts that the Mackell and Avis defendants conspired to conceal the alleged conspiracy, and that plaintiffs were unaware of the conspiracy until "public hearings held by the New York State Joint Legislative Committee on Crime on May 3 and October 11, 1973 and until the trial of defendant Monty in February and March 1974". The complaint also alleges that in the fall of 1973 the defendants twice attempted unsuccessfully to bribe the plaintiffs into having the legislative committee call off its investigation.

The Relief Sought.

Count One of the complaint seeks compensatory

and punitive damages directly under the fourth, fifth, sixth, eighth, and fourteenth amendments. Count Two seeks the same relief but under 42 USC §1983. As noted previously, Count Three has been withdrawn by stipulation.[4/] Citing 28 USC §§2201 and 2202, Count Four seeks an order: (1) declaring that the indictment and arrests of the plaintiffs are null and void, and (2) requiring expungement of all governmental records of the indictment and arrests.[5/]

DISCUSSION

One of the grounds common to all defendants' motions to dismiss is that plaintiffs' claims are time-barred. Absent an applicable federal statute of limitations, the court must look to state law. Specifically, "An action brought under the federal Civil Rights Act is subject to the statute of limitations the state courts would apply in an analogous state action." Meyer v. Frank, Doc. No. 76-7172, slip op. at 1366 (CA2 Jan. 12, 1977). And this court has applied the same principle to civil rights claims asserted directly under the Constitution. Ervin v. Lanier, 404 F Supp 15, 20 (EDNY 1975) (fourth amendment). Moreover, whatever statutory period applies to plaintiffs' claims for damages also applies to their claims for equitable relief.

Mizell v. North Broward Hospital District, 427 F2d 468 (CA5 1970); Baker v. F & F Investment, 420 F2d 1191, 1193 (CA7), cert. denied sub nom., Universal Builders Inc. v. Clark, 400 US 821 (1970); Needleman v. Bohlen, 386 F Supp 741, 749 (D Mass 1974).

What then would be the applicable New York limitations period? Normally, "the applicable statute of limitations in a federal civil rights case brought in New York is the three years provided by N.Y.C.P.L.R. §214(2) -- liability based on a statute." Kaiser v. Cahn, 510 F2d 282, 284 (CA2 1974) (42 USC §1983); accord, Ervin v. Lanier, supra (fourth amendment). Since the complaint was filed on April 12, 1976, ordinarily only acts which occurred after April 11, 1973 would be actionable. Virtually all the events described in the complaint precede that date. However, plaintiffs make three arguments in an attempt to save their action.

First, plaintiffs point to the unsuccessful attempts to bribe them which defendants allegedly made in the fall of 1973. But any such attempts are of no significance here since none is alleged to have caused any plaintiff actual injury. Mizell v. North Broward Hospital District, supra, 427 F2d at 475; Hoffman v. Halden, 268 F2d 280, 302 (CA2 1959).

According to the complaint, the last act of defendants that actually injured the plaintiffs occurred on June 9, 1972, when the defendants allegedly coerced Sta-Brite into entering a guilty plea and the Cestaros and Marchetti into executing releases. That was well over three years before plaintiffs filed their complaint.

Second, plaintiffs urge that defendants are estopped from asserting any statute-of-limitations defense. But plaintiffs do not claim that defendants misled them as to either the relevant statutory requirements or the need to comply with them. Compare Glus v. Brooklyn Eastern District Terminal, 359 US 231 (1959). Moreover, by May of 1973, at the latest, plaintiffs were fully aware of the nature of the conduct which they now ascribe to the defendants; yet, this action was not filed until well over two years later. Under such circumstances, equity clearly should not bar application of the statute of limitations.

Plaintiffs' third argument to escape the three year limitations period is based on the concealment doctrine. Under this federal doctrine, except where Congress has expressly provided to the contrary, a statute of limitations is tolled as long as a plaintiff, through no fault of his own,

remains ignorant of his claim because of the defendants' having fraudulently concealed the underlying facts.[6] Plaintiffs contend, and I therefore assume, that the defendants fraudulently concealed their conspiracy, and that plaintiffs did not discover they had cognizable claims against defendants until the public hearings held by the New York State Joint Legislative Committee on Crime in May of 1973.[7]

Defendants counter this claim with several arguments, only one of which needs to be considered since it is dispositive. Defendants argue that when the concealment doctrine is invoked to toll a limitations period which otherwise would have expired, then a separate two year period becomes applicable under NYCPLR §203(f), to run from the date of "discovery".[8] Since plaintiffs concede their actual discovery of the relevant facts to have been more than two years prior to their filing the complaint, the action, defendants argue, is time-barred.

The key question for decision, then, is whether NYCPLR §203(f) applies where a limitations period has been tolled under the federal concealment doctrine. I hold that it does because, except where otherwise expressly provided,[9] the New York statute's two year period must be applied in any

action where time is computed from "discovery" of the facts.

Subsection (f) of NYCPLR §203 provides:

> Except as provided in article 2 of the uniform commercial code or in section two hundred fourteen-a of this chapter, where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer. (Emphasis supplied.)

Effective in 1963 as part of New York's new Civil Practice Law and Rules, §203(f) was an innovation to New York practice. Its language bespeaks a clear legislative policy that for any New York action where the time to sue is extended because of failure to discover the wrong, the maximum extension should be two years.

As noted by Professor McLaughlin in his "Practice Commentary" on this section:

> The philosophy behind this statute is simple: a plaintiff whose statute of limitations has been tolled until he discovers the cause of action, and who discovers the cause of action long after it has accrued, should not have the same length of time in

> which to sue as a plaintiff who discovers his cause of action promptly. Thus, the statute provides that, where a statute of limitations is tolled pending discovery, the plaintiff shall have his basic statute of limitations computed from the time the cause of action accrued or two years from discovery, whichever is longer.
>
> McKinney's Consolidated Laws of New York, Book 7B at 125-26.

And, as the Joint Committee on the Civil Practice Act commented in its Sixth Report to the Legislature in support of section 203(f),

> [W]here the facts are not discovered and the period consequently would not begin to run until long after the event, there seems no reason why the plaintiff should not be required to proceed expeditiously after such discovery period. The period adopted for such cases is two years from the discovery unless the applicable period -- computed without benefit of postponement for non-discovery -- would not have run by this time.
>
> McKinney's Consolidated Laws of New York, Book 7B at 127-28 (emphasis supplied).

True, §203(f) has been applied most commonly in actions for fraud, [10/] where by express statute time is computed from actual or imputed discovery. [11/] However, the language of §203(f) is not confined to fraud actions, or even to the larger category of actions where a statute provides that time runs from "discovery". Instead, the section is broad in

scope, and as noted by Professor McLaughlin in his "Survey of New York Law", it "appears to be of general applicability". 21 Syr. L. Rev. 709, 716 (1969).[12/] Both the statute's language and underlying policy confirm that conclusion.

Research has disclosed only one case which faced the question of whether §203(f) should apply in a non-statutory discovery situation. Slagen v. Morrill, 356 NYS2d 511 (Sup Ct, Rensselaer County 1974). There, plaintiff commenced his foreign object malpractice action more than two, but less than three years after "discovery". Under Flanagan v. Mount Eden General Hospital, 24 NY2d 427, 301 NYS2d 23 (1969), the three year malpractice statute of limitations was tolled until "discovery". The question before the Slagen court was whether, calculating from the "discovery", to apply the usual malpractice three year period, or to apply §203(f)'s two year period. Finding the latter period applicable, the court dismissed the complaint.[13/]

Similarly here, the federal concealment doctrine tolls the limitation period until "discovery". Once the facts are discovered, however, New York law determines the length of the applicable period. Under §203(f) either of two periods may apply: two years from "discovery" or three

years from injury, whichever is longer. Since plaintiffs' claims here are clearly barred by both periods, the complaint must be dismissed.

SO ORDERED.

Dated: Westbury, New York
March 17, 1977

GEORGE C. PRATT
U. S. DISTRICT JUDGE

F O O T N O T E S

1/ Defendant Savage has not been served.

2/ The action was dismissed as to defendant City of New York by stipulation filed on September 28, 1976.

3/ By stipulations filed November 9, 1976, the plaintiffs withdrew without prejudice "Count III" of their complaint which asserted claims under 42 USC §§1985 and 1986.

4/ See note 3, supra.

5/ Initially, Count Four made a demand for similar relief with respect to the conviction of Sta-Brite. The demand was withdrawn by stipulation filed November 30, 1976. Count Four was withdrawn as to the Avis defendants and defendant Monty by stipulation filed in November of 1976.

6/ Moviecolor Ltd. v. Eastman Kodak Co., 288 F2d 80 (CA2), cert. denied, 386 US 821 (1961); Atlantic City Electric Co. v. General Electric Co., 312 F2d 236, 239 (CA2 1962); City of Detroit v. Grinnell Corp., 495 F2d 448, 460-61 (CA2 1974); Baker v. F & F Investment, 420 F2d 1191, 1198-200 (CA7), cert. denied sub nom., Universal Builders Inc. v. Clark, 400 US 821 (1970); Pollard v. United States, 384 F Supp 304, 307 (MD Ala 1974) (§1983 claim); Mittendorf v. J.R. Williston & Beane Inc., 372 F Supp 821, 833 (SDNY 1974); Saylor v. Lindsley, 302 F Supp 1174, 1180-81 n 12, 1183 (SDNY 1969).

7/ In their memorandum filed September 1, 1976, at page 25, plaintiffs concede that the concealment doctrine does not toll the statute of limitations past May of 1973.

8/ "Discovery" in this context means either actual or imputed discovery of the claim.

9/ See NYCPLR §214-a discussed in note 12, infra.

10/ See, e.g., Klein v. Shields & Co., 470 F2d 1344 (CA2 1972); Klein v. Auchincloss, Parker & Redpath, 436 F2d 339, 341 (CA2 1971); Hoff Research & Development Laboratories, Inc. v. Philippine National Bank, 426 F2d 1023 (CA2 1970); Mittendorf v. J.R. Williston & Beane, Inc., 372 F Supp 821, 830 (SDNY 1974).

11/ NYCPLR §213(8), formerly §213(9), provides that "the time within which [an action based upon fraud] must be commenced shall be computed from the time the plaintiff or the person under whom he claims discovered the fraud, or could with reasonable diligence have discovered it." For other New York statutes of limitations which by their own terms become operable upon actual or imputed discovery, see NYCPLR §§ 206(a)(1) & (b) and 214(7).

12/ See also "The Discovery Provisions of Article Two of the CPLR and Other Problems With the Statute of Limitations," 10th Annual Report of Judicial Conference of the State of New York 96 (1965), where, although in a somewhat different context, the Conference espoused the objective of "mak[ing] the alternative formula of §203(f) generally applicable to all actions where the time of discovery is a factor in computing the statute of limitations."

13/ The Slagen v. Morrill rule that §203(f) applies in discovered foreign objects cases was superseded in 1975 by NYCPLR §214-a which provides that such cases may be commenced within one year of the date of "discovery". (The normal period established by §214-a for medical malpractice actions is two and one-half years.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ MAR 18 1977 ★
TIME A.M.
P.M.

G. THOMAS CESTARO, CATHERINE CESTARO, RICHARD MARCHETTI and STA-BRITE AUTO PAINTING CORP.,

Plaintiffs,

-against-

THOMAS J. MACKELL, JAMES D. ROBERTSON, FREDERICK J. LUDWIG, JOSEPH N. MONTY, DAVID J. McKEON, THE CITY OF NEW YORK, SALVATORE GIUFFRIDA, JOHN SAVAGE, BERNARD NELSON, CHARLES NAPOLITANO, STUART B. STILLMAN, AVIS RENT-A-CAR SYSTEM, INC., and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Defendants.

JUDGMENT

76-C-682

ENTERED

A memorandum and order of Honorable George C. Prat United States District Judge, having been filed on March 18, 1977 granting the defendants' motion to dismiss the complaint, it is

ORDERED and ADJUDGED that the plaintiffs take nothing of the defendants and that the complaint is dismissed.

Dated: Westbury, N.Y.
March 18, 1977

Lewis Orgel
Clerk

By Mark L. Larson
Deputy Clerk

CERTIFICATE OF SERVICE

This is to certify that on the 20th day of May, 1977, I served one copy of the appendix upon each of the attorneys for the defendants-appellees, by mailing such copy to each of them at the following addresses:

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Dated: May 20, 1977

Marshall Beil

Marshall Beil